No. 84-1340 (14)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WENDY WYGANT, SUSAN LAMM, JOHN KRENKEL, KAREN SMITH, SUSAN DIEBOLD, DEBORAH BRZEZINSKI, CHERYL ZASKI, and MARY ODELL,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, Jackson, Michigan, and RICHARD SURBROOK, President, and DON PENSON, ROBERT MOLES, MELVIN HARRIS, CECELIA FIERY, SADIE BARHAM, and ROBERT F. COLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION, FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION, GEORGIA ASSOCIATION OF EDUCATORS, MASSACHUSETTS TEACHERS ASSOCIATION, MICHIGAN EDUCATION ASSOCIATION, WASHINGTON EDUCATION ASSOCIATION, and WISCONSIN EDUCATION ASSOCIATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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This brief, *amici curiae*, is filed by the National Education Association (NEA) and certain of its affiliates with the consent of the parties, pursuant to the Rules of this Court.

INTEREST OF *AMICI CURIAE*

NEA is a nationwide employee organization, with a current membership of some 1.7 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, the District of Columbia and Puerto Rico, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. The California Teachers Association, the Florida Teaching Profession-National Education Association, the Georgia Association of Educators, the Massachusetts Teachers Association, the Michigan Education Association, the Washington Education Association and the Wisconsin Education Association Council all are NEA state affiliates.

One of the principal objectives of NEA and its affiliates is to secure improvements in the terms and conditions of employment of educational employees. Toward that end, they engage in collective bargaining and otherwise represent these employees in dealing with their employers regarding terms and conditions of employment.

Although *amici* strongly believe that the seniority principle provides an objective and equitable standard on which to base employment decisions, including decisions regarding layoffs, their commitment to the seniority principle is not absolute. *Amici* believe that there are certain situations in which a rigid application of the seniority principle does not provide an appropriate basis for making employment decisions and some compromise in the principle is necessary. One such situation arises when, as part of an overall effort to remedy the effects of its past educational discrimination and fully integrate the school system, a school board seeks to achieve a racially diverse faculty by according preferential treatment to minorities in hiring, and—if necessary to preserve the progress that has been made as a result of this

preferential hiring—by also providing some protection for such minorities against layoffs.

The beneficial nature of an affirmative action program in any situation must be carefully balanced against the possible harm to affected parties, and *amici* believe that this balance is best made when the program is developed by the employer and the employee organization through collective bargaining or other equivalent forms of dialogue. Provisions for affirmative action in hiring and layoffs are included in many of the collective bargaining agreements between local affiliates of *amici* and public school employers. Because the Court is being asked in this case to decide whether a collectively bargained affirmative action provision that accords preferential treatment to minorities in layoffs is permissible under the 14th Amendment to the United States Constitution, *amici* have a substantial interest in the outcome. Moreover, the Jackson Education Association, which is a party to the collective bargaining agreement that contains the affirmative action layoff provision at issue, is a local affiliate of NEA and the Michigan Education Association.

Finally, because *amici* appear to be the only employee organizations filing a brief *amici curiae* in support of respondents, they provide a perspective that the Court otherwise would not receive.

INTRODUCTION AND SUMMARY OF ARGUMENT

In deciding this case, the lower courts applied the analysis set forth in the Court's employment discrimination cases, and on the basis of that analysis concluded that the affirmative action layoff provision at issue did not violate the rights of laid off non-minority employees under the Equal Protection Clause of the 14th Amendment to the United States Constitution. In challenging the lower courts' conclusion, petitioners and their supporting *amici* likewise cast this as a typical employment discrimination case and argue that the challenged layoff provision must be assessed—and justified—solely as a remedy for discriminatory employment practices. Al-

though we believe that petitioners and their supporting *amici* have misinterpreted this Court's employment discrimination jurisprudence and agree with respondents that the decision below should be affirmed under the principles of that jurisprudence, the issue presented in this case may be addressed from another perspective. We submit that an alternative ground for upholding the challenged affirmative action layoff provision may be found in the law of school desegregation.

This case concerns the authority of a school board to take appropriate steps to remedy the effects of its past educational discrimination and achieve a fully integrated school system.[1] The Jackson School System had a long history of schools racially identifiable as either "white" or "black"—*i.e.*, schools with a disproportionate number of white or black students. In order to remedy this situation, the Jackson School Board in the early 1970's voluntarily adopted a comprehensive desegregation program, an integral part of which was an effort to achieve a racially diverse faculty. The purpose of the challenged layoff provision was to preserve the progress that had been made toward the latter goal, and its validity properly should be assessed in that context. As one court explained in similar circumstances:

> The action of the school board was *not* directed toward the employment opportunities available to teaching faculty nor the elimination of any past discrimination in employment. We do not approach the issue in that frame of reference. *The focus of this action of the school board was to enhance the educational opportunities available to the students* by achieving better racial balance in the teaching faculty throughout the district. *This is an educational objective which has been well recognized and approved by the Supreme Court.*

Zaslawsky v. Board of Education, 610 F.2d 661, 664 (9th Cir. 1979) (emphasis added).

[1] The facts that show the connection between the challenged affirmative action layoff provision and the desegregation of Jackson's schools are set forth in the Statement of the Case in Respondent's Brief and also in the Brief *Amicus Curiae* filed by the Jackson Education Association. Certain of these facts are summarized in Part II of the Argument section of this brief.

When analyzed in these terms, the legal inquiry before the Court is whether, as part of an overall program to remedy the effects of its past educational discrimination and achieve a fully integrated school system, a school board voluntarily may adopt an affirmative action layoff provision of the type at issue without violating the Equal Protection Clause of the 14th Amendment.[2] We address this question in Part I of the Argument section of this brief, and in support of an affirmative answer show the following:

1. A school board may use race-conscious measures to promote a sufficiently compelling governmental interest. The obligation of a school board to remedy the effects of its past educational discrimination and achieve a fully integrated school system constitutes such a compelling interest. (Part I(A)).

[2] This question has significance quite apart from whether, based on the record in this case, this particular layoff provision can be sustained. Affirmative action layoff provisions designed to preserve the gains made through increased minority hiring are by no means uncommon in public education. Provisions substantially identical to that at issue here appear in collective bargaining agreements covering educational employees in Tacoma, Yakima, and Seattle, Washington; Tucson, Arizona; Indianapolis and South Bend, Indiana; Portland, Oregon; Colorado Springs and Pueblo, Colorado; Racine, Wisconsin; and Lansing and Grand Rapids, Michigan, among others. A modified version of this provision appears in the collective bargaining agreement covering educational employees in Madison, Wisconsin. In addition to these provisions that seek to maintain pre-layoff racial diversity, *amici* are aware of many other school districts, including districts in Alaska, Arizona, Connecticut, Colorado, Florida, Indiana and Kansas, that have collectively bargained provisions that authorize the school board to "consider" racial balance or to adhere to its affirmative action objectives in determining the order of layoff.

2. A finding by a court or outside administrative agency that a school board has engaged in unlawful discrimination is not a prerequisite for the use of race-conscious measures in the school desegregation context. A school board itself may serve as "the governmental body . . . mak[ing] findings that demonstrate the existence of illegal discrimination" in its own school system. *Fullilove v. Klutznick*, 448 U.S. 448, 498 (1980) (opinion of Powell, J.). Moreover, these findings need not be developed through any particular procedure or set forth in any particular form; they may be reflected in statements and conduct which, when viewed in their totality, constitute an acknowledgement by the school board of its past discrimination. (Part I(B)).

3. A racially diverse faculty is "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *United States v. Montgomery County Board of Ed.*, 395 U.S. 225, 232 (1969). (Part I(C)(1)). A school board that has found discrimination in its practices should be accorded substantial discretion in deciding what steps are appropriate to achieve a racially diverse faculty, and its actions in this regard, if reasonable, should not be disturbed by a reviewing court. A school board reasonably might conclude that an affirmative action layoff provision that is designed to preserve the progress that has been made through increased minority hiring is necessary to achieve a racially balanced faculty. (Part I(C)(2)).

In Part II of the Argument section of this brief, we consider whether the affirmative action layoff provision in this case was in fact adopted by the Jackson School Board as part of a comprehensive program designed to remedy the effects of its past educational discrimination and achieve a fully integrated school system. Inasmuch as the record that is before the Court is not fully developed with regard to the background and purpose of the provision, we draw essentially upon documents from the records of prior legal proceedings that have been lodged with the Court by respondents to demonstrate

that the answer to this question is yes. Although the Court may be precluded from relying upon the facts reflected in these documents to affirm the decision of the lower court, it can take judicial notice of their existence. If it fails to affirm on the ground urged by respondents and/or other of their supporting *amici*, it should remand so that a more complete evidentiary record can be developed for consideration of the important constitutional issues that are posed by this case in the area of school desegregation law.

ARGUMENT

I. THE 14TH AMENDMENT DOES NOT PREVENT A SCHOOL BOARD FROM VOLUNTARILY ADOPTING AN AFFIRMATIVE ACTION LAYOFF PROVISION AS PART OF A COMPREHENSIVE PROGRAM DESIGNED TO REMEDY THE EFFECTS OF ITS PAST EDUCATIONAL DISCRIMINATION AND ACHIEVE A FULLY INTEGRATED SCHOOL SYSTEM.

A. A School Board May Use Race-Conscious Measures To Remedy the Effects of Its Past Educational Discrimination and Achieve a Fully Integrated School System.

Our analysis begins with two propositions of constitutional law that are firmly established by the decisions of the Court.

First, a public agency may use race-conscious measures if necessary to promote a compelling governmental interest. *Regents of the University of California v. Bakke*, 438 U.S. 265, 307, 310-15 (1978) (opinion of Powell, J.); *id.* at 362-69 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) The relevant constitutional inquiries in this context are (1) whether the governmental interest is sufficiently compelling so as to warrant the use of racial criteria, and (2) if so, whether the particular race-conscious measure at issue is sufficiently related to the promotion of that interest. *Bakke*, 438 U.S. at 299 (opinion of Powell, J.); *Fullilove*, 448

U.S. at 480 (opinion of Burger, C.J.); *id.* at 519 (opinion of Marshall, J.). *See Dayton Board of Ed. v. Brinkman*, 433 U.S. 406, 419-20 (1977) (*Dayton I*); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*).

Second, a school board has a compelling interest in remedying the effects of its past educational discrimination and achieving a fully integrated school system. Over thirty years ago, the Court held that separate public schools for white and black children violate the 14th Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and 349 U.S. 294 (1955) (*Brown II*). Education is "a principal instrument in awakening the child to cultural values," the Court stated, and "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown I*, 347 U.S. at 493-94. "Where a racially discriminatory school system has been found to exist, *Brown II* imposes the *duty* on local school boards to 'effectuate a transition to a racially nondiscriminatory school system.'" *Columbus Board of Ed. v. Penick*, 443 U.S. 449, 458 (1979) (emphasis added). This duty encompasses the dual responsibility of ending invidious racial discrimination and undoing its continuing effects. Justice Powell made this point in his separate opinion in *Bakke*:

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment.

438 U.S. at 307. *See also id.* at 362-63 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

Nor is there any doubt that this interest is sufficiently compelling so as to warrant the use of race-conscious

measures to promote it. Following repeated demonstrations that the transition to a unitary, nonracial system of public education in this country could not be accomplished by the adoption of race-neutral measures alone, the Court, in *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), held that school boards may be *required* under the Constitution to give *affirmative consideration* to race in order to eliminate the effects of past discrimination. As the result of *Green*, and the Court's subsequent decisions, black children must be accorded the opportunity not merely to attend a formerly all-white school, but to attend a non-racial school that is not infected by past discrimination. In order to provide this opportunity, school boards may be required to use student reassignment, redistricting, zoning, and other similar race-conscious measures. *Id.* at 442. *See North Carolina Board of Ed. v. Swann*, 402 U.S. 43, 46 (1971) (*Swann II*).

In short, "the creation of unitary school systems, in which the effects of past discrimination ha[ve] been 'eliminated root and branch,' [is] a compelling social goal justifying the overt use of race." *Bakke*, 438 U.S. at 363 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). This much is not open to dispute.

B. A Finding of Past Educational Discrimination by a Court or Outside Administrative Agency Is Not a Prerequisite for a School Board To Use Race-Conscious Measures as Part of a School Desegregation Program.

A basic question that arises with regard to the proposition set forth in Section A above is whether a finding of past discrimination by a court or outside administrative agency is necessary in order for a school board to use race-conscious measures as part of a school desegregation program. Although a majority of the Court has not yet determined whether such a finding is required as a prerequisite for race-conscious action by govern-

mental bodies generally,[3] the Court effectively has resolved this question in the school desegregation context.

The decisions of the Court in school desegregation cases make it abundantly clear that a school board need *not* wait for a judicial or administrative finding of discrimination before it may act. To the contrary, the Court has established that a school board has a constitutional *duty* to remedy its own past educational discrimination, *Milliken v. Bradley*, 433 U.S. 267, 283 (1977) (*Milliken II*); *Swann v. Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 15 (1971) (*Swann I*), and that it may voluntarily adopt race-conscious measures to achieve this objective without violating the Fourteenth Amendment, even though no court or outside administrative agency has found a constitutional violation. As Chief Justice Burger observed for a unanimous Court in *Swann I*, where school desegregation is concerned, "[j]udicial authority enters only when local authority defaults." 402 U.S. at 16.

[3] In *Bakke*, four members of the Court concluded that the faculty of the University of California at Davis lawfully could adopt racial preferences in the selection of students without any formal findings of past discrimination, 438 U.S. at 362-64, 366 n.42, 369 (opinion of Brennan, White, Marshall, and Blackmun, JJ.), while one member of the Court concluded that such preferences were unlawful without "judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307-09 (opinion of Powell, J.). The remaining members of the Court did not reach the constitutional issues. *Id.* at 411-12, 421 (opinion of Stevens, J.).

In *Fullilove*, the majority voting to uphold preferences for minority business enterprises was composed of three members of the Court who concluded that judicial or administrative findings were not necessary as a prerequisite to congressional action, 448 U.S. at 520 n.4 (opinion of Marshall, J.), two members of the Court who were willing to uphold the congressional action without addressing the need for any formal findings, *id.* at 490-92 (opinion of Burger, C.J.), and one member who concluded that findings were required but that such findings could be inferred from "the total contemporary record of Congressional action dealing with the problems of racial discrimination against minority business enterprises," *id.* at 497-98, 503 (opinion of Powell, J.).

Consistent with this position, the Court, in *McDaniel v. Barresi*, 402 U.S. 39 (1971), reversed a state court's attempt to set aside a school board's voluntary desegregation plan that assigned students on the basis of race. Given that no court or outside administrative agency had made findings of a constitutional violation in *Barresi*, the decision can only be understood as endorsing a race-conscious remedy based solely on the school board's own assessment of its past conduct.[4] *Cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 161 (1977) (upholding State's voluntary, race-conscious reapportionment plan). Further support for a school board's "authority to act in response to identified discrimination" (*Fullilove*, 448 U.S. at 498 (opinion of Powell, J.)) is found in the Court's repeated invalidation of state efforts to limit the power of school boards voluntarily to adopt race-conscious desegregation remedies. *See Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Swann II*; *McDaniel v. Barresi*.

The principle that we assert is not unresponsive to the concern expressed by Justice Powell in *Bakke* and *Fullilove* that race-conscious measures should not be upheld unless they are supported by findings of past discrimination made by a competent administrative, judicial, or legislative body.[5] Justice Powell's concern is focused on past *societal* discrimination—a subject as to which school boards admittedly possess no special competence.[6] But the question in school desegregation cases is not societal discrimination: it is rather discrimination resulting from

[4] A majority of the Court apparently adopted this view in *Bakke*. Justice Powell referred to *Barresi* as involving a "remed[y] for [a] clearly determined constitutional violation[]." 438 U.S. at 300. Justices Brennan, White, Marshall, and Blackmun described *Barresi* as a case approving race-conscious remedies "where such findings [of past discrimination] have not been made." *Id.* at 364.

[5] *Bakke*, 438 U.S. at 308-09 (opinion of Powell, J.); *Fullilove*, 448 U.S. at 497-98 (opinion of Powell, J.).

[6] *Cf. Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

the school board's own educational practices.[7] School boards not only are competent to assess such practices, but there are strong reasons why they should be allowed and, indeed, encouraged to do so.

First, as the Court repeatedly has emphasized, local control over the management and operation of schools is our most "deeply rooted" tradition in public education, *Milliken I*, 418 U.S. at 741-42; *Dayton I*, 433 U.S. at 410; *San Antonio School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *Wright v. Council of City of Emporia*, 407 U.S. 451, 469 (1972). The school board typically is the administrative body that has legal responsibility for the general operation of the school system, including the specific responsibility for ensuring that students receive the benefits of a fully desegregated education.

Second, as indicated above, the Court's opinions on the subject of school desegregation are replete with broad language imposing on school boards the affirmative *duty* to remedy their own past educational discrimination without waiting for instructions from an external authority. *See* pages 8-10, *supra*. If school boards were forbidden to use race-conscious measures until a court or outside administrative agency had made findings of past discrimination, conscientious school boards would be hamstrung in their efforts to "eliminate discrimination root and branch," and school boards that are not so conscientious would have a ready excuse to delay the transition to a fully integrated school system. *See Bakke*, 438 U.S. at 362-63 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *id.* at 398-99 (opinion of Marshall, J.).

Third, the Court has acknowledged the difficulties that are involved when a court or outside administrative

[7] *See Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (redressing the wrongs of past discrimination in school cases is "far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.")

agency attempts to determine whether a governmental body has engaged in unlawful educational discrimination:

> Findings as to the motivations of multimembered public bodies are of necessity difficult, *cf. Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and the question of whether demographic changes resulting in racial concentration occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

Dayton I, 433 U.S. at 414. A conscientious school board is in a far better position than any outside agency to assess its own past actions.

For these reasons, school boards are competent to make any "findings" of past discrimination that may be needed to support the use of race-conscious measures in a school desegregation program. A school board's findings do not have to be made with the exactitude that would be expected in a judicial or administrative proceeding, or be supported by the type of "record" that would be developed in such a proceeding. *Cf. Fullilove*, 448 U.S. at 506 (opinion of Powell, J.); *id.* at 478 (opinion of Burger, C.J.); *id.* at 520 n.4; (opinion of Marshall, J.). In attempting to determine whether there has been unlawful discrimination in its own school system, a school board should not be forced to rely solely upon evidence that could be adduced at a formal trial. The practical advantages of a process of self-assessment can be realized only if a school board is able to use information received from students, teachers, parents, community groups and any other source that is likely to provide insights as to the motives or impact of the board's actions. Nor should a school board be required to articulate its findings in any particular manner or set them forth in a precise form. Given the political realities, for example, many school boards would be unwilling to declare openly that they have been guilty of unlawful educational discrimination. Indeed, one of the principal reasons why a school board

might decide to initiate a voluntary desegregation program would be to avoid precisely such a finding by a court or outside administrative agency. The conclusion that emerges is this: any requirement that a school board must make "findings" of unlawful educational discrimination as a prerequisite to voluntary action should be deemed satisfied if it reasonably can be inferred from the totality of the school board's conduct that it "had a sound basis for believing" that unlawful educational discrimination had occurred in the school system, and that either that discrimination or its effects warranted remedial measures. *Cf. Bakke*, 438 U.S. at 369-70 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *Fullilove*, 448 U.S. at 502-03 (opinion of Powell, J.).

C. A Racially Diverse Faculty Is Necessary To Remedy the Effects of Past Educational Discrimination and Achieve a Fully Integrated School System. A School Board Reasonably Might Conclude that an Affirmative Action Layoff Provision Such as That at Issue Here Is Necessary To Achieve a Racially Diverse Faculty.

1. *The Importance of a Racially Diverse Faculty.*

The Court has recognized that a racially diverse faculty is "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination." *U.S. v. Montgomery County Board of Ed.*, 395 U.S. at 231-32. "[R]acial allocation of faculty denies [students] equality of educational opportunity without regard to segregation of pupils." *Rogers v. Paul*, 382 U.S. 198, 200 (1965). *See also Smith v. Board of Education*, 365 F.2d 770, 782 (8th Cir. 1966) (in which then-Circuit Judge Blackmun observed that proper desegregation of students "inevitably means that some of them will be exposed to teachers of another race.").[8]

[8] Several courts have noted that the ability to identify a faculty by race is a significant indication of a school system still in the grips of segregationist policies. *See, e.g., Swann I*, 402 U.S. at 18; *United States v. School District of Omaha*, 521 F.2d 530, 538 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Reed v. Rhodes*, 422 F.Supp. 708, 787-88 (N.D. Ohio 1976), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Arthur v. Nyquist*, 415 F. Supp. 904, 945 (W.D.N.Y. 1976), *aff'd*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978).

Nor is there any doubt as to the purpose that is served by a racially diverse faculty. This purpose derives from the central role that teachers play in establishing the quality of education that a school system provides to its students, and faculty integration is intended for the benefit of the students—not of the minority teachers. *See Dayton Board of Ed. v. Brinkman*, 443 U.S. 526, 539-40 & n.13 (1979) (*Dayton II*); *Columbus Board of Ed. v. Penick*, 443 U.S. at 460; *Swann I*, 402 U.S. at 18-20; *Bradley v. School Board of City of Richmond*, 382 U.S. 103, 104-05 (1965); *Rogers v. Paul*, 382 U.S. at 200. As the Third Circuit explained recently in *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 905 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985):

> Schools are great instruments in teaching social policy, for students learn not only from books, but from the images and experiences that surround them. One such lesson is of a spirit of tolerance and mutual benefit, a lesson that is more difficult to absorb when schools attended by black students are taught by black teachers while schools attended by white students are taught by white teachers.[9]

[9] The reasons offered by the Third Circuit in support of a racially diverse faculty strongly echo the reasons the Court has advanced for sustaining race-conscious measures to achieve racial diversity within student populations:

> Minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," . . . while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage.

Washington v. Seattle School District No. 1, 458 U.S. at 472-73.

[continued]

The position that the courts have taken regarding faculty integration is confirmed by educational research: there is substantial empirical evidence to indicate that a racially diverse faculty is essential to effective school desegregation.[10] A school with a desegregated student population but an essentially all-white teaching staff will have more difficulty maximizing achievement of minority students and preparing them for a range of adult roles than will a school with an integrated faculty.[11] Minority students in a school of the former type frequently encounter lower faculty expectations for their academic performance, receive less attention in non-academic situations, and are subject to discriminatory behavior in terms of assignment to ability groups, grading, and disciplinary treatment.[12] For all of these rea-

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[9] [Continued]

See also Morton v. Mancari, 417 U.S. 535, 548, 554 (1974) (sustaining law that gives members of federally-recognized Indian tribes an employment preference in the Bureau of Indian Affairs, on the ground that employees of BIA have pervasive influence over tribal members, and employment of Indians by BIA furthers goal of tribal self-governance; Court makes reference to legislation enacted by Congress in 1972 "explicitly requir[ing] that Indians be given preference in Government programs for training teachers of Indian children").

[10] W. Hawley, et al., *Assessment of Current Knowledge About the Effectiveness of School Desegregation Strategies*, vol. VI, 86-87 (Vanderbilt University, 1981), (hereinafter cited as "*Vanderbilt Study*"); *Effective School Desegregation: Equity, Quality, and Feasibility*, 301 (W.D. Hawley ed. 1981); G.A. Forehand and M. Ragosta, *A Handbook for Integrated Schooling*, 11-12 (1976).

[11] *Vanderbilt Study*, vol. I, 86; M. Weinberg, *Minority Students: A Research Appraisal*, 240 (1977).

[12] *See Vanderbilt Study*, vol. I, 87-88; M. Chesler and P. Segal, *Characteristics of Negro Students Attending Previously All-White Schools in the Deep South* (1967); Coates, *White Adult Behavior Toward Black and White Children*, 43 Child Development 143 (1972); R. Mayer, et al., *The Impact of School Desegregation in a Southern City* (1974); G. Gay, *Differential Dyadic Interaction of Black and White Teachers With Black and White Pupils in Recently*

sons, there is an increased likelihood that minority students will be alienated from school if they are taught essentially by white teachers.[13]

Conversely, minority students tend to achieve higher levels of performance when they are exposed to minority teachers.[14] Minority teachers generally accord minority students more attention in non-academic settings, and

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Desegregated Social Studies Classrooms: A Function of Teacher and Pupil Ethnicity (1974); B. Brooks, A Study of 95 Children Travelling by Bus to a K-5 School as Part of the Open Enrollment Program in a Large Urban School System (1969) (Doctoral dissertation; summary on file at Library of Congress); Katz, *Some Motivational Determinants of Racial Differences in Intellectual Achievement*, 2 International Journal of Psychology 1 (1967); Johnson, Gerard, and Miller, Teacher Influences in the Desegregated Classroom, in H.B. Gerard and N. Miller, *School Desegregation* (1975). Additionally, researchers have found that the lower the proportion of minority teachers in a school, the lower the grades and college attendance rates of minority students. *See* R.L. Crain and R.E. Mahard, *The Influence of High School Racial Composition on Black College Attendance and Test Performance* (1978). The problem of disproportionate minority student suspensions has been extensively documented. *See* Arnez, *Implementation of Desegregation as a Discriminatory Process*, 47 Journal of Negro Education 28 (1978); Miller, *Student Suspensions in Boston: Derailing Desegregation*, 20 Inequality in Education 16 (1975).

[13] *Vanderbilt Study*, vol. I, 86; G. Noar, *The Teacher and Integration* (1974). In addition, white teachers tend to characterize minority students in different and more negative terms than do minority teachers. Gottlieb, *Teaching and Students: The Views of Negro and White Teachers*, 37 Sociology of Education 345 (1964); Coates, *White Adult Behavior Toward Black and White Children, supra.*

[14] *Vanderbilt Study*, vol. I, 87; G. Bridge, C. Judd and P. Moock, *The Determinants of Educational Outcomes: The Effects of Families, Peers, Teachers and Schools* (1979); R.J. Murnane, *The Impact of School Resources on the Learning of Inner City Children* (1975); Bosma, *The Role of Teachers in School Desegregation*, 15 Integrated Education 106 (1977); Katz, *Some Motivational Determinants of Racial Differences in Intellectual Achievement, supra.*

are less likely than white teachers to place minority children in lower tracks.[15] Minority teachers have substantially greater expectations for minority students' college attendance and completion.[16] Moreover, it is important that minority students be provided with role models in order to help foster positive morale and self-concepts.[17]

The presence of minority teachers in significant numbers contributes to the morale and sensitivity of white teachers, and enhances their ability to deal with the special problems of minority students. This presence also leads to a broadening and improvement of parent attitudes.[18] Finally, white as well as minority students benefit from an integrated workplace, in which they have an opportunity to interact with members of minority groups in positions of respect and authority. This interaction tends to diminish the atmosphere of racial tension fostered by a lack of understanding and leads to better race relations.[19]

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[15] System Development Corp., *Human Relations Study: Investigations of Effective Human Relations Strategies*, vol. II (1980).

[16] Beady and Hansell, *Teacher Race and Expectations for Student Achievement*, 18 American Educational Research Journal 191 (1981); R.L. Crain and R.E. Mahard, *The Influence of High School Racial Composition on Black College Attendance and Test Performance, supra.*

[17] *Vanderbilt Study*, vol. VI, 86-87; Haney, *The Effects of the Brown Decision on Black Educators*, 47 Journal of Negro Education 88 (1978); R.J. Murnane, *The Impact of School Resources on the Learning of Inner City Children, supra*; System Development Corp., *Human Relations Study, supra*; Bosma, *The Role of Teachers in School Desegregation, supra*; M. Weinberg, *The Search for Quality Integrated Education*, 192 (1983); E.E. McAdams, Relationship Between School Integration and Student Morale (1974) (Doctoral dissertation; summary on file at Library of Congress).

[18] *Vanderbilt Study*, vol. VI; Bosma, *The Role of Teachers in School Desegregation, supra.*

[19] W. Genova and H. Wallberg, *A Practitioners' Guide for Achieving Student Integration in City High Schools* (1981); System Development Corp., *Human Relations Study, supra; Vanderbilt Study*, vol. VI; G. Noar, *The Teacher and Integration, supra* at 58; National Education Assn., *School Desegregation Guidelines for Local and State Education Associations*, 12 (1980); G.A. Forehand and M. Ragosta, *A Handbook for Integrated Schooling, supra;* R.L. Crain, R.E. Mahard and R.E. Narot, *Making Desegregation Work* (1982).

2. *The Need for an Affirmative Action Layoff Provision.*

The decisions of the Court establish that a school board is to be accorded considerable discretion in formulating a plan to remedy the effects of its past educational discrimination and achieve a fully integrated school system.[20] All reasonable measures adopted by a school board toward that end should be upheld by a reviewing court.[21] Given that a racially diverse faculty is a necessary part of an overall school desegregation program, the question becomes whether a school board reasonably might conclude that an affirmative action layoff provision such as the one at issue here is necessary to achieve a racially diverse faculty. We address this question below, and demonstrate that the answer is yes.

As with other aspects of the school desegregation problem, more than simply "color-blind" decisions may be necessary to achieve a racially diverse faculty. When the faculty already contains a significant number of minority

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[20] *See Swann I*, 402 U.S. at 15-16; *Swann II*, 402 U.S. at 45; *McDaniel v. Barresi*, 402 U.S. at 42; *United States v. Montgomery County Board of Ed.*, 395 U.S. at 235 & n.6; *Green v. County School Board*, 391 U.S. at 439.

[21] *See Swann II*, 402 U.S. at 46; *Green v. County School Board*, 391 U.S. at 439; *Morgan v. O'Bryant*, 671 F.2d 23, 28 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982); *Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1340 (5th Cir. 1980); *Detroit Police Officers' Association v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

This discretion is necessary not only because of the vital importance of local autonomy in operating the nation's schools, see p. 12, *supra*, but also because the choices that must be made in this regard have profound effects on educational policy. *See Washington v. Seattle School District No. 1*, 458 U.S. at 479-80; *United States v. Montgomery County Board of Ed.*, 395 U.S. at 235; *Swann II*, 402 U.S. at 46.

teachers, a school board may be required to assign currently employed teachers on the basis of race in order to achieve an appropriate balance throughout the school system. If minority teachers are underrepresented on the faculty as a whole,[22] however, this obviously will not suffice: to achieve the desired result, it may be necessary for a school board to engage in preferential hiring in order to increase the overall proportion of minority teachers. This Court and the lower federal courts repeatedly have held that such race-conscious assignments and hiring are lawful means for achieving a racially diverse faculty. *See Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 35 (1971); *United States v. Montgomery County Board of Ed.*; *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3rd Cir .1984), *cert. denied*, 105 S.Ct. 782 (1985); *Morgan v. O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982). *See also Porcelli v. Titus*, 431 F.2d 1254, 1257 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (upholding affirmative action plan for hiring supervisory faculty adopted voluntarily by school board to bring proportion of minority supervisors closer to that of minority students.)[23]

If the faculty is expanding, a preferential hiring program can increase the number of minority teachers, and

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[22] Unlike *de jure* segregation in the South, which involved dual school systems with minority and non-minority faculties, segregation in many areas of the North arose without the presence of a substantial group of minority teachers. *See* HEW Office of Education and National Center for Educational Statistics, *Public Elementary and Secondary Schools in Large School Districts with Enrollment and Instructional Staff, By Race, Fall 1967* (1969); HEW Office for Civil Rights, *Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic Group* (1968); *id.* (1970); *id.* (1972).

[23] Whether the preferential hiring plan is keyed to the percentage of minority students or to some other race-conscious goal is irrelevant from a constitutional standpoint, so long as the plan is lawfully implemented. Petitioners in this case have not challenged the affirmative action hiring practices of the Jackson School Board.

may be sufficient to achieve a racially diverse faculty. Even if the size of the faculty remains constant, the normal turnover resulting from retirements and resignations ordinarily will enable a school board to hire additional minority teachers. These hiring opportunities do not exist, however, when declining enrollment, increased costs or other reasons make it necessary to reduce the size of the teaching staff. Nor will the result of this staff reduction be simply to freeze the minority/non-minority *status quo*. The recently hired minority teachers will have less seniority than most of their white colleagues, and if the layoffs are based strictly on seniority, the progress that has been made through preferential hiring toward achieving a racially diverse faculty could be wiped out. As the First Circuit put it in *Boston Chapter NAACP v. Beecher*, 679 F.2d 965, 974-75 (1st Cir. 1982), *vacated as moot*, 461 U.S. 477 (1983), a race-conscious layoff policy may be necessary "to insure that [hiring] relief already [achieved] not be eviscerated by seniority-based layoffs." *See also Morgan v. O'Bryant*; *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981).

It is not an adequate answer to say that the absence of minority teachers will only be temporary, and that the objectives to be served by a racially diverse faculty will be realized when the laid off minority teachers are recalled. As previously noted, faculty integration is intended not for the benefit of minority teachers, but for the benefit of students. During the period of the layoffs, those students who pass through the schools will be irrevocably deprived of an essential element of a desegregated education. Moreover, teacher layoffs are not always temporary. In many school districts, they result from a steady decline in student enrollment, and it is by no means certain if or when there will be a reversal of the trend.

Not only would the layoffs of recently hired minority teachers reinstate, and perhaps perpetuate, a condition that in the school board's view prevented the effective desegregation of the school system, but it would impart

precisely the wrong message to minority students. These students are not likely to appreciate the intricate relationship between seniority and affirmative action, and well might conclude that they have been misled as to the opportunities that are available to them in a predominantly white society—that doors which are open when conditions are favorable will be closed as soon as conditions become unfavorable.

In short, hiring and layoffs are opposite sides of the same coin, and there is no principled reason why a school board's constitutional obligation to remedy the effects of its past educational discrimination and achieve a fully integrated school system should not, in appropriate circumstances, justify the use of a race-conscious layoff policy to preserve the progress that has been made through preferential hiring. There is, to be sure, an "instinctive" difference between hiring and layoffs. When layoffs are involved, the "innocent" non-minorities can be more precisely identified and the adverse impact on them more readily gauged. For non-minority employees whose seniority would protect them from layoff but for the minority retention preference, reasonable expectations have been disappointed. But as three justices of the Court observed in somewhat analogous circumstances, "[i]t is not a constitutional defect in this [policy] that it may disappoint the expectations of non-minority [employees]." *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.).[24]

The foregoing is not meant to suggest that any affirmative action layoff policy necessarily will pass constitutional muster simply because it is designed to preserve the progress that has been made through preferential hiring. Al-

[24] The seniority-based expectations of non-minority employees would be subject to modification even if they had been hired prior to the negotiation of a lay-off provision. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778-79 (1976). In the instant case, petitioners all were hired years after the seniority system was modified to reflect the terms of the challenged affirmative action layoff provision.

though a school board may have considerable discretion in deciding how to remedy the effects of its past educational discrimination, the actions taken in this regard must be reasonable. In practical terms, this means that the beneficial nature of a particular race-conscious measure must be balanced against the possible harm to the affected parties. The Court made essentially this type of balance in *Steelworkers v. Weber*, 443 U.S. 193 (1979), which involved a Title VII challenge to a voluntary affirmative action plan implemented by Kaiser Aluminum and Chemical Corporation. The plan admitted black employees to a training program at a one-to-one rate with white employees, with the result that some black employees were admitted in preference to more senior white employees.

In sustaining the challenged plan, the *Weber* Court noted initially that it was designed to advance the purposes of Title VII, in that the employment categories involved were ones that had been traditionally segregated. The Court then identified several specific criteria as relevant to its determination that the plan was reasonable.[25] In the instant case, the lower courts applied the *Weber* analysis to the challenged affirmative action layoff provision and, based upon that analysis, concluded that it did not violate the rights of the laid off non-minority teachers under the Equal Protection Clause. Although this conclusion certainly is justified,[26] we submit that a *Weber*-type

[25] The Court stated that the plan did "not unnecessarily trammel the interests of the white employees"; did not "create an absolute bar [with respect] . . . to the white employees"; and was intended only as "a temporary measure." *Weber*, 443 U.S. at 208.

[26] Public school employment unquestionably is an area in which discrimination traditionally has been present. *See, e.g., Columbus Board of Ed. v. Penick*, 443 U.S. at 467; *Swann I*, 402 U.S. at 18; *United States v. Montgomery County Board of Ed.*, 395 U.S. at 231-32; *Rogers v. Paul*, 382 U.S. at 199; *Brown I*, 347 U.S. at 495; *Morgan v. O'Bryant*, 671 F.2d at 27; *Zaslawsky v. Board of Education*, 610 F.2d at 664; *Caulfield v. Board of Education*, 632

analysis cannot, in and of itself, be determinative as to the reasonableness of an affirmative action plan in the school desegregation context.

Weber was an employment discrimination case, in which the affirmative action plan was designed solely to increase minority participation in certain job categories and end segregated patterns of staffing. As such, the intended beneficiaries of the plan were the minority employees, and in judging its reasonableness, the Court balanced the interests of those employees against the interests of the more senior non-minority employees. An affirmative action layoff provision such as the one at issue here promotes a school board's compelling interest in remedying the effects of its past educational discrimination and achieving a fully integrated school system. The students—both minority and non-minority—are the "identifiable victims" of the past school board practices that produced a substantially white faculty, and they—not the minority teachers—are the intended beneficiaries of the affirmative action layoff

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F.2d 999, 1005-07 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Porcelli v. Titus*, 431 F.2d at 1254.

The challenged layoff provision does not unnecessarily trammel the interests of the non-minority teachers: it simply increases the chances that these teachers will be laid off during a reduction in force. Moreover, the Jackson Education Association, which is comprised predominantly of non-minority teachers, consented to the provision when it ratified the collective bargaining agreement with the School Board. Although such consent is not sufficient to validate an otherwise unlawful affirmative action provision, it does at least indicate that the non-minority teachers as a group did not consider that the provision constituted an unreasonable burden upon them.

Nor does the provision create an absolute bar to the protection of non-minority teachers. It does not categorically prohibit the layoff of minority teachers, but simply maintains the proportion of such teachers at whatever level it may be when layoffs become necessary. Accordingly, minority and non-minority teachers share the burden of the reduction in force.

Finally, the policy is temporary in nature. Inasmuch as it is contained in a collective bargaining agreement of only a few years' duration, it is subject to periodic review and reappraisal by both the School Board and the union.

provision. Their interest in—and constitutional right to—the benefits of a desegregated education significantly affects the balance made in *Weber*, and provides an even stronger argument for upholding this type of affirmative action layoff provision.[27]

Ignoring the above distinction, certain of the *amici* supporting petitioners contend that this case can be disposed of soleiy on the basis of Title VII, and that Title VII prohibits the use of this type of affirmative action layoff provision. We, of course, disagree, and by way of response simply would point out that when Congress extended coverage of Title VII to employees of public educational institutions in 1972, it was well aware of the widespread use of race-conscious measures to remedy the effects of past educational discrimination, including specifically the use of such measures to achieve faculty integration. Indeed, Congress explicitly referred to the benefit that a racially diverse faculty brings to the educational process:

> It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971). Against this backdrop, we cannot believe that Title VII was intended to preclude a school board from continuing to use

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[27] In analytical terms, this distinction reflects the fact that the frameworks for judging the reasonableness of an affirmative action plan under the Equal Protection Clause and under Title VII are different. The Equal Protection Clause requires that the affirmative action plan be directed toward achieving an important governmental interest. *Weber* requires that the plan be designed to advance the purposes of Title VII—*i.e.*, to remedy discrimination in an employment category that traditionally has been segregated.

the type of race-conscious measures that previously were available to fulfill its constitutional obligation to remedy the effects of its past educational discrimination and achieve a fully integrated school system.

II. THE AFFIRMATIVE ACTION LAYOFF PROVISION AT ISSUE IN THIS CASE WAS A REASONABLE PART OF THE SCHOOL BOARD'S COMPREHENSIVE PROGRAM TO REMEDY THE EFFECTS OF ITS PAST EDUCATIONAL DISCRIMINATION AND ACHIEVE A FULLY INTEGRATED SCHOOL SYSTEM.

As we have demonstrated in Part I above, a voluntarily adopted affirmative action layoff provision can pass constitutional muster when it is a reasonable part of a school board's comprehensive program to remedy the effects of its past educational discrimination and achieve a fully integrated school system. In order to determine whether this principle has application here, it is necessary to consider the background and purpose of the challenged affirmative action layoff provision, but the record in this case is not fully developed with regard to these matters. Unlike previous affirmative action cases that have come before the Court, no discovery was taken, no affidavits were submitted and there was no trial on the merits. Shortly after the complaint was filed, the parties filed cross-motions for summary judgment based almost entirely on the pleadings; the district court granted respondents' motion and dismissed petitioners' claim.

In an effort to provide some understanding as to the evidence that could be adduced regarding the background and purpose of the affirmative action layoff provision that is at issue, we understand that respondents intend to lodge with the Court the records from three prior legal proceedings: a 1969 administrative proceeding before the Michigan Civil Rights Commission; a 1974 federal court action, *Jackson Education Association v. Board of Education of the Jackson Public Schools*, Civil No. 4-72340 (E.D. Mich.); and a 1977 state court action,

Jackson Education Association v. Board of Education of the Jackson Public Schools, No. 77-011484CZ (Jackson County Circuit Court). The facts that appear in these records are discussed at length in respondents' brief and in the *amicus curiae* brief filed by the Jackson Education Association in support of respondents. We will not burden the Court with a reiteration of that discussion here. For present purposes, it is sufficient simply to highlight certain key points which demonstrate that the challenged affirmative action layoff provision was adopted by the Jackson School Board as part of a comprehensive program to remedy the effects of its past educational discrimination and achieve a fully integrated school system.[28]

1. Until the fall of 1972, Jackson maintained racially identifiable elementary schools. Its high schools and junior high schools had been integrated only a few years before. JEA Brief at 11-12.

2. In 1969, the Jackson NAACP filed a complaint with the Michigan Civil Rights Commission alleging widespread educational discrimination in the Jackson schools. To settle the proceeding, the School Board agreed to take a variety of actions, including the hiring of more minority teachers. That settlement was approved by the Commission. JEA Brief at 7-9.

3. Between 1969 and 1972, the School Board deliberated extensively about the question of segregation in its school system. Throughout these deliberations, the need for a racially diverse faculty was considered an integral part of the desegregation effort. One of the four key elements of the plan that ultimately was adopted by the School Board was to take affirmative measures to achieve a racial balance in the faculty "as close as possible to that of the students" and to assign a minimum

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[28] For convenience, we cite only to the pages of the Jackson Education Association's *amicus curiae* brief where the facts in question are set forth, rather than to the underlying documents that evidence these facts.

of two minority teachers to each school. This decision was made because the School Board believed that a racially diverse faculty would be educationally beneficial to minority and non-minority students alike. JEA Brief at 11-14, 19-20.

4. The school system fell far short of having enough minority teachers to place two in each school, and the School Board actively attempted to hire more minority teachers, relying heavily on recruitment at Southern colleges. JEA Brief at 13, 16, 19.

5. Almost as soon as the School Board had begun to make some progress in increasing the proportion of minority teachers on the faculty, it faced a problem of declining enrollment that would require teacher layoffs every year for the foreseeable future. The School Board concluded that laying off teachers on the basis of seniority would wipe out all of the progress it had made toward achieving a racially diverse faculty. It also concluded that such layoffs would severely hamper any future recruiting efforts at Southern colleges when the Board again was able to hire new teachers, because college graduates would not be willing to move to Jackson if they faced the prospect of being laid off shortly after relocating. JEA Brief at 16-20.

6. The layoff provision that the School Board and the Jackson Education Association included in their collective bargaining agreement does not seek artificially to maintain any particular proportion of minority teachers. It provides only that minority teachers will not be selected for layoff in a proportion greater than their current proportion on the faculty, so that the progress that has been made through minority hiring will not be wiped out by layoffs. JEA Brief at 4-6.

Although we recognize that the Court may be precluded from affirming the judgment below based on evidence that may not be in the record of this case, the documents from these earlier proceedings make it clear that this is not simply an employment discrimination case.

Accordingly, if the decision of the lower court is not affirmed on the present record, this case should be remanded so that respondents can present additional evidence to demonstrate that the challenged affirmative action layoff provision was in fact a reasonable part of a comprehensive program adopted by the Jackson School Board to remedy the effects of its past educational discrimination and achieve a fully integrated school system.

CONCLUSION

For the reasons set forth in respondents' brief, the judgment of the Sixth Circuit should be affirmed. If the judgment is not affirmed, the case should, for the reasons set forth in this brief, be remanded so that a more complete evidentiary record can be developed as to the purpose and background of the challenged affirmative action layoff provision.

Respectfully submitted,

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